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Attorney for GREEN TREE LOAN SERVICING LLC and MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON (TACOMA)

JAMES A. BIGELOW Plaintiff, vs. NORTHWEST TRUSTEE SERVICES, INC.; GREEN TREE SERVICING, LLC; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.; and DOE DEFENDANTS 1-20 Defendants.	Case No.: 3:14-cv-05798 BHS **NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT BY DEFENDANTS GREEN TREE SERVICING LLC AND MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.**

TO ALL PARTIES IN INTEREST:

PLEASE TAKE NOTICE THAT on January 2, 2015 in Courtroom E of the District Court, Western District of Washington, located at 1717 Pacific Avenue, Tacoma, WA 98402, Defendants GREEN TREE SERVICING LLC and MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. ("MERS") (hereinafter "Defendants" collectively) by and through their counsel of record, Renee M. Parker of Wright, Finlay & Zak, LLP, will and does hereby move this Court for an order dismissing the Amended Complaint in this matter in its entirety, without leave to further amend, and with prejudice for failure to state a claim upon

which relief can be granted pursuant to Federal Rules of Civil Procedure ("FRCP") 12(b)(6). Pursuant to Local Rule ("LR") 7(d)(3) any opposition shall be filed and served no later than the Monday before the noting date, which is December 29, 2014.

This motion is based on this notice, accompanying motion, memorandum of points and authorities, and any and all other evidence, declarations, documents or pleadings in the Court files in this case, and any oral argument that this Court wishes to hear.

Dated: December 2, 2014

Respectfully submitted,
WRIGHT, FINLAY, & ZAK, LLP

By: _____
Renee M. Parker, WSBA # 36995
Attorneys for Defendants,
GREEN TREE SERVICING LLC and
MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS, INC.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. RELIEF REQUESTED

Defendants moves the Court for an order dismissing the Amended Complaint filed by Plaintiff JAMES A. BIGELOW pursuant to FRCB 12(b)(6) for failure to state a claim against Defendants upon which relief can be granted.

Dismissal is appropriate as the Plaintiff's allegations against Defendants lack facial plausibility given they are factually unsupported and based upon erroneous legal conclusions. Plaintiff has filed his complaints without any basis for recovery under Washington law, merely lays out the facts of lawful contractual transfers between parties, and attempts to raise legal issues that are applicable to real property actions to which Plaintiff is not a party.

For the reasons stated below, the Court should grant Defendants' Motion with prejudice.

II. IDENTIFICATION OF PARTIES AND STATEMENT OF FACTS

A. IDENTIFICATION OF PARTIES AND PROPERTY

JAMES BIGELOW ("Plaintiff" singularly) is the Plaintiff in the instant litigation. The Subject Property, defined below, is owed by Plaintiff and his non-party spouse CAROLYN BIGELOW (hereinafter "Borrowers" collectively).

The real property at issue is commonly known as 10018 CASCADIAN AVENUE SE, YELM, WASHINGTON 98597 ("Subject Property"), APN 65730002800.

GREEN TREE LOAN SERVICING LLC (hereinafter "Green Tree") services the Loan on behalf of the Federal National Mortgage Association ("Fannie Mae"), and is the holder of the Note and assignee of the Deed of Trust. The Assignment of Mortgage that granted, conveyed and assigned all rights to Green Tree was recorded with the Thurston County Auditor on or about April 20, 2012 as Instrument No. 4261697. Green Tree is a Delaware limited liability corporation currently registered to conduct business in Washington State and having UBI No. 602302513 with the Washington Department of Corporations. Fannie Mae is a federally chartered corporation having a principal office in Washington, DC.

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MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. (hereinafter "MERS"), a Delaware corporation with its principal place of business in Virginia, is identified as the original beneficiary under the Deed of Trust as nominee for the original lender, lender's successors and/or assigns. MERS does not "conduct business" in the State of Washington pursuant to RCW 23B.15.010(2)(g)–(h).

NORTHWEST TRUSTEE SERVICES, INC. (hereinafter "NWTS") is the successor trustee under the Appointment of Successor Trustee recorded with the Thurston County Auditor as Instr. No. 4266605 on or about May 18, 2012. NWTS is a for-profit corporation currently registered to conduct business in Washington State and having UBI No. 602376725 with the Washington Department of Corporations.

B. STATEMENT OF FACTS

On or about April 24, 2007 James Bigelow and Carolyn Bigelow, husband and wife, executed a Note in the amount of $233,899.00 in favor of Pierce Commercial Bank. The Note was secured by a Deed of Trust encumbering the Subject Property (with both documents comprising the "Loan"). The Deed of Trust was recorded with the Thurston County Auditor on or about April 27, 2007 as Instrument No. 3922368. *See* Request for Judicial Notice ("RJN") Exs. 1-2,[1] which are true and correct copies of the Note and Deed of Trust, respectively.

The Loan was transferred to Green Tree on or about April 19, 2012. The Corporate Assignment of Deed of Trust ("Assignment") was recorded with the Thurston County Auditor on or about April 20, 2012 as Instrument No. 4261697. *See* RJN Ex. 3.Green Tree is the holder of the Note and services of the Loan on behalf of Fannie Mae.

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[1] On a motion to dismiss, a court may consider documents offered by defendants that were originally referenced in Plaintiffs' complaint. *United States v. Ritchie*, 342 F.3d 903, 907–08 (9th Cir. 2003) ("A court may, however, consider certain materials-documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice-without converting the motion to dismiss into a motion for summary judgment").

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NWTS was appointed as the successor trustee on or about May 14, 2012; an Appointment of Successor Trustee was recorded with the Thurston County Auditor on or about May 18, 2012. *See* RJN Ex. 4.

Beginning with the payment due on November 1, 2011, Borrowers defaulted under the terms of the Note and Deed of Trust by failing to perform monthly payment obligations.

A Notice of Default was sent to the Borrowers on or about May 10, 2012. *See* RJN Ex. 5. Borrowers failed to cure the default. A Notice of Trustee's Sale, having a sale date of August 29, 2014, was recorded April 30, 2014 in the official records of the Thurston County Auditor as Instr. No. 4389907. *See* RJN Ex. 6. The sale has been postponed to November 14, 2014 due to the bankruptcy filed by Plaintiff on October 9, 2014. *See* RJN Ex. 7.

Although Plaintiff filed bankruptcy around the same date this litigation was filed, Plaintiff did not file a Notice of Stay of Proceedings with this Court pursuant to Local Bankruptcy Rule 2072-1, which states "A debtor who is a party to an action in any other court shall, as soon as possible following the filing of a petition for relief, give notice to the court, any judge to whom the case is assigned and all other parties. The notice shall identify the court, case caption, docket number and date such petition was filed."

Plaintiff's bankruptcy case does not affect Defendant's ability to file this Motion to Dismiss under the holdings in *Gordon v. Whitmore (In re Merrick)*, 175 B.R. 333, 336 (9th Cir. BAP 1994) and *In re Way*, 229 B.R. 11, 13 (9th Cir. BAP 2009), which essentially state that in a complaint brought by the Debtor, a defendant is authorized to continue the litigation by defending itself. In its defense, a defendant may file a demurrer, motion to dismiss, propound discovery, and go to trial etc., without seeking relief from stay from the Court.

III. STATEMENT OF ISSUES

The issue before this Court is whether the Amended Complaint should be dismissed pursuant to Washington Superior Court Civil Rule 12(b)(6) as to Defendants GREEN TREE

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SERVICING LLC ("Green Tree") and MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. ("MERS") ("Defendants" collectively).

IV. EVIDENCE RELIED UPON

This Motion is based upon the records and pleadings filed herein, and the Declaration of Green Tree in support of this Motion, together with the exhibits attached with Defendants' concurrently filed Request for Judicial Notice.

V. ARGUMENT AND AUTHORITIES

A. LEGAL STANDARD FOR DISMISSAL OF CLAIMS UNDER CR 12(b)(6)

A motion to dismiss under Fed. R. Civ. P. 12(b)(6) tests the legal sufficiency of the pleadings. *Navarro v. Block*, 250 F.3d 729, 731 (9th Cir. 2001). "A Rule 12(b)(6) motion tests the sufficiency of a complaint's factual allegations." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Kost v. Kozakiewicz*, 1 F.3d 176, 183 (3d Cir. 1993). A court's fundamental inquiry in the Rule 12(b)(6) context is "not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), abrogated on other grounds by *Harlow v. Fitzgerald*, 457 U.S. 800, 814-15 (1982). The United States Supreme Court has explained that dismissal for failure to state a claim under Fed. R. Civ. P. 12(b)(6) is appropriate where the factual allegations do not raise the right to relief above the speculative level. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A "formulaic recitation of the elements of a cause of action will not do." *Id.*

A court "must dismiss a Complaint" if a plaintiff can prove no set of facts to support a claim which would entitle him to relief. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 533-34 (9th Cir. 1984), *Balisteri v. Pacific Police Dept.*, 902 F.2d 696, 699 (9th Cir. 1990). If a critical, threshold element is missing from a plaintiff's complaint, a motion to dismiss under Rule 12(b)(6) must be granted. *Baliesteri* at 699.

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Moreover, a court's "obligation to construe allegations in the light most favorable to the nonmoving party does not mean that those allegations must be construed in a light favorable to the moving party, if such a construction cannot reasonably be made." *S. Ferry LP No. 2 v. Killinger*, 399 F.Supp. 2d 1121, 1127 (W.D.Wash. 2005). "[T]he tenet that a court must accept all of the allegations contained in a complaint is inapplicable to legal conclusions," and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949 (2009). Likewise, this District has held:

> To survive a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. It is not enough for a complaint to plead facts that are merely consistent with a defendant's liability. Rather, a claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully.

McCann v. Quality Loan Service Corp., 729 F. Supp. 2d 1238, 1240 (W.D.Wash. 2010) (internal citations and quotations omitted).

Although the Court must construe a pro se plaintiff's complaint liberally, Plaintiffs nonetheless must satisfy Fed. R. Civ. P. 8(d)(1), which requires each allegation to be "simple, concise, and direct." This requirement "applies to good claims as well as bad, and is the basis for dismissal independent of Rule 12(b)(6)." *McHenry v. Renne*, 84 F.3d 1172, 1179 (9th Cir. 1996). "Something labeled a complaint but written more as a press release, prolix in evidentiary detail, yet without simplicity, conciseness and clarity as to whom plaintiffs are suing for what wrongs, fails to perform the essential functions of a complaint." *McHenry*, 84 F.3d at 1180. "Prolix, confusing complaints ... impose unfair burdens on litigants and judges." *McHenry*, 84 F.3d at 1179.

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"In general, when ruling on a CR 12(b)(6) motion to dismiss, the trial court may only consider the allegations contained in the complaint and may not go beyond the face of the pleadings." *Sebek v. City of Seattle*, 172 Wash.App 273, 275 (FN2) (2012) (internal citations omitted). However, courts must consider the Complaint in its entirety, including documents incorporated by reference. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). The Ninth Circuit has stated: "Documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss." *In re Stac Electronics Securities Litigation*, 89 F.3d 1399, 1405 n.4 (9th Cir. 1996). *See also Lowden v. T-Mobile USA, Inc.*, 2009 WL 537787 (W.D.Wash. 2009) (stating that, on a motion to dismiss, a court "may consider documents incorporated into a complaint either by reference or because the document is central to the Plaintiffs' claim") (citing *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006)).

It is clear that where amendment to the pleadings would be futile, a court may dismiss a complaint without leave to amend. See *Havas v. Thorton*, 609 F.2d 372 (9th Cir. 1979).

As a direct result of *Twombly* and the remaining cases cited above, there is now a heightened scrutiny of complaints and the allegations therein. It is no longer permissible to make sweeping, generic assertions in a complaint.

Here, Plaintiff alleges no facts whatsoever giving rise to a claim under the Fair Debt Collection Practices Act ("FDCPA"), the Washington Deed of Trust Act ("DTA") and the Washington Consumer Protection Act ("CPA"). Since further amendment to Plaintiff's Complaints would be futile this Court must grant Defendants' CR 12(b)(6) motion without leave to amend.

B. PLAINTIFF FAILED TO JOIN ALL NECESSARY PARTIES

Rule 19(a)(1) of the Federal Rules of Civil Procedure requires all persons be joined to the litigation, where feasible, if: "(A) in that person's absence, the court cannot accord complete

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relief among existing parties; or (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest." *See also, Carpenters 46 Northern California Counties Joint Apprenticeship & Training Committee and Training Board v. Eldredge*, 459 U.S. 917 (1982).

Despite two persons having an interest in the Subject Property under the Note and Deed of Trust at issue in this case, specifically Plaintiff and joint borrower Carolyn Bigelow, Carolyn Bigelow did not partake in, and was not named as a party to, the present litigation. As a result, any relief that this Court would order in favor of Plaintiff would both dispose of an action in the absence of a necessary party to this litigation, and also leaves Defendants subject to additional and potentially inconsistent litigation by Carolyn Bigelow for the same claims.

Accordingly, Plaintiff's case must be dismissed due to the absence of the co-owner of the Subject Property and co-debtor under the Note in the present litigation. .

C. PLAINTIFF'S CONTRACT CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS

RCW § 4.16.040 states: "**Actions limited to six years.** The following shall be commenced within six years: (1) "An action upon a contract in writing, or liability express or implied arising out of a written agreement… (3) An action for the rents and profits or for the use and occupation of real estate".

All of Plaintiff's claims all stem solely from the Note and Deed of Trust, which Plaintiff and Carolyn Bigelow executed on or about April 24, 2007 -- over six years ago. The Complaint would have had to be filed on or before April 24, 2013 in order to overcome the statute of limitations issue. Plaintiff did not file this or any other known lawsuit until October 7, 2014.

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Therefore, any claim on the contract is time-barred by statute and the Amended Complaint must be dismissed without leave to amend.

D. PLAINTIFF'S CONSUMER PROTECTION ACT CLAIM UNDER RCW § 19.86.020 IS BARRED BY STATUTE

Plaintiff's Consumer Protection Act claim is barred by the four-year limitations period. RCW 19.86.120 ("Any action to enforce a claim for damages under RCW 19.86.090 shall be forever barred unless commenced within four years after the cause of action accrues."), which has been followed by *Powell v. Sphere Drake Ins. P.L.C.,* 108 Wash.App 1007, 2001 WL 1011948 at *4 (2001).

The statute of limitations on a cause of action under RCW § 19.86.020 ("Consumer Protection Act" or "CPA") begin to accrue when the Deed of Trust is executed, not when foreclosure is commenced. "Plaintiff's CPA claim accrued on or before December 27, 2006, when the loan transaction closed." *Wescott v. Wells Fargo Bank, N.A.*, 862 F.Supp.2d 1111, 1118 (W.D.Wash. 2012). "Ms. Zhong claims she did not learn of the alleged misrepresentations (such as listing MERS as a beneficiary) until foreclosure was initiated in 2012. However, Ms. Zhong could have learned of these facts at any time simply by reading her loan papers… Therefore, Ms. Zhong cannot state a claim for relief premised on Defendants' alleged misrepresentations at the time of the loan's origination." *Zhong v. Quality Loan Svc. Corp. of Washington*, 2013 WL 5530583, *4 (W.D.Wash. 2013) (citing *Howard v. Countrywide Home Loans, Inc.,* C13–0133JL R, 2013 WL 1285859 (W.D.Wash. Mar.26, 2013) and *Green v. A.P.C.,* 136 Wash.2d 87, 960 P.2d 912, 915 (Wash.1998).

The Deed of Trust naming MERS as beneficiary in a nominee capacity was executed on or about April 24, 2007; because the Deed of Trust was executed over six years ago Plaintiff's CPA claim is time-barred by statute.

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E. PLAINTIFF'S CLAIM UNDER THE FAIR DEBT COLLECTION PROTECTION ACT (FDCPA) FAIL

The Fair Debt Collection Practices Act ("FDCPA") was enacted as a broad remedial statute designed to "eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." 15 U.S.C. § 1692(e).

In order to plead a claim for violation of the FDCPA, a plaintiff is required to allege facts demonstrating that (1) Defendants were collecting debt as debt collectors and that (2) Defendants' debt collection actions violated the federal statute. *See, Jerman v. Carlisle, et al.*, 559 U.S. 573, 130 S.Ct. 1605, 1606 (2010) (citing 15 U.S.C. § 1692 et seq.).

For the reasons below, it is Defendants' contention that they are not a "debt collector" as a matter of law. "The Court finds the legislative history and the legal authority discussed above to be persuasive, and therefore finds that none of the Defendants (an assignee, a servicing company, and a fiduciary) is a 'debt collector' as defined in the FDCPA. The Court further finds that the non-judicial foreclosure proceeding at issue is not an attempt to collect a 'debt' for FDCPA purposes." *Mansour v. Cal-W.Reconveyance Corp.*, 618 F. Supp. 2d 1178, 1182 (D. Ariz. 2009), *aff'd*, No. 09-16778, 2010 U.S App. LEXIS 12464 (9th Cir. June 17, 2010).

Because there is some dispute among the Ninth Circuit district courts as to whether foreclosure trustees and/or loan servicers qualify as debt collectors under the FDCPA, this district has found that these entities *may* meet the FDCPA's definition of the "debt collector" to the extent that a plaintiff alleges a violation under 15 U.S.C. § 1692f(6). *See e.g., Oliver v. Ocwen Loan Servs., LLC*, 2013 WL 210619 at **3-4 (W.D. Wash. Jan. 18, 2013); *Amador v. Cent. Mortgage Co.*, 2012 WL 405175 at *2 (W.D. Wash. Feb. 8, 2012). "The test for determining whether a debt collector violated the FDCPA is objective and does not depend on whether the debt collector intended to deceive or mislead the consumer." *Clark v. Capital Credit*

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& Collection Servc., Inc., 460 F.3d 1162, 1171 (9th Cir. 2006). The "least sophisticated" debtor standard applies; "the liability analysis turns on whether a debt collector's communications would mislead an unsophisticated but reasonable consumer." *Id.*

Thus, assuming that Plaintiff can allege that Defendant is a "debt collector" within the meaning of the statute, his claim still fails because he did not allege any facts demonstrating that Defendant violated Section 1692f(6).[2] Plaintiff's only allegation, that appears to relate to Section 1692f(6), incorrectly relies on the contention that Defendants recorded an Assignment and Appointment of Successor Trustee without an ability to do so.

In order for Plaintiff to reasonably make a claim for violation of the FDCPA, Plaintiff was required to show that the communications by Defendants "misled" Plaintiff into making payments that were otherwise not owed. The Borrowers executed a Note, and also a Deed of Trust, using the Subject Property as security for repayment of the debt. Therefore Plaintiff knows he owes *some party* for the payments required by the Note.

Although Plaintiff includes QWR and/or debt validation responses from Defendants and NWTS as exhibits to his Complaint, the exhibits do not appear to support Plaintiff's FDCPA claim to the extent an "unsophisticated but reasonable consumer" would have been gravely misled by the contents of the correspondences (or any of the recorded documents) because none contained "empty threats" used as a means to coerce payment from Plaintiff. *Lensch v. Armada Corporation*, 795 F.Supp.2d 1180, 1185 (W.D. Wash. Jun. 13, 2011).

Moreover, although Plaintiff claims the loan was transferred while the "alleged debt was under default (Amended Complaint, ¶ 41), the holdings in *Oliver v. Ocwen Loan Servs., LLC*, 2013 WL 210619 at *4 (W.D. Wash. Jan. 18, 2013) and *Dietz v. Quality Loan Serv. Corp. of Washington*, 2014 WL 1245269 at *2 (W.D. Wash. Mar. 25, 2014) recognize that "the

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[2] As explained in *Amador, supra,* such violation may exist where "a debt collector 'tak[es] or threaten[s] to take any non judicial action to effect dispossession or disablement of property if—there is no present right to possession of the property claimed as collateral through an enforceable security interest.'" *Amador*, at *3.

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'FDCPA's definition of debt collector does not include the consumer's creditors, a mortgage servicing company, or any assignee of the debt" where the debt was not in default when transferred to the parties currently seeking to enforce the Note and Deed of Trust."

"Because 'default' is not defined in the FDCPA, courts have looked to the contracts underlying the debt, or other applicable statutes. *See Walcker v. SN Commerical, LLC*, 2006 WL 3192503 (not reported, E.D. Wash. 2006), citing *Gacy v. Gammage & Burnham,* 2002 WL 467937 (D.Ariz.2006), *Hartman v. Meridian Fin. Serv., Inc.,* 191 F.Supp.2d 1031, 1044 (W.D.Wisc.2002), *Skerry v. Massachusetts Higher Educ. Assistance Corp.,* 73 F.Supp.2d 47, 53-54 (D.Mass.1999).

Like *Walcker*, the Loan documents here state that default occurs after written notice of the default is sent, and is not cured within 30 days of that notice. *See* RJN Ex. 1, Paragraph 6(B) and Ex. 2, Paragraph 22. Plaintiff's Exhibit L and RJN Ex. 5 both show that the default notice was not sent until May 10, 2012, which is after the date the Assignment evidencing the transfer of the Loan was recorded. Accordingly, Green Tree is not a "debt collector" because default had not yet been declared when the transfer of the Loan to Green Tree occurred.

With respect to Plaintiff's allegations that MERS is a debt collector, case law clearly rebuts this contention and Plaintiff makes no allegation that MERS made any attempt to collect on the debt in question. Simply stated, MERS is not, and never is a debt collector. "As an initial matter, Plaintiffs have not demonstrated that Fannie Mae, Flagstar, or MERS are "debt collectors" under the FDCPA." *Cameron v. Acceptance Capital Mortg. Corp.*, 2013 WL 5664706 at *4 (W.D. Wash. 2013) (citing *Fagerlie v. HSBC Bank, N.A.,* 2013 WL 1914395, *5 (W.D.Wash.2013) which dismissed Plaintiff's cause of action because no foreclosure occurred).

Accordingly, Defendants are not subject to the FDCPA because they are not "debt collectors" or alternatively Plaintiff failed to show that Defendants violated any statute related to the FDCPA.

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F. PLAINTIFFS CLAIMS UNDER THE DEED OF TRUST ACT FAIL

In his second claim, although nothing in this Cause of Action pertains to Defendants specifically, Plaintiff appears to allege that Defendants violated unspecified provisions of the Deed of Trust Act ("DTA") by recording an Assignment of Deed of Trust and Appointment of Successor Trustee. Amended Complaint, ¶¶ 161-170.

Plaintiff also appears to contend that Defendants failed to materially comply with the provisions of the DTA because it was improper for MERS to execute the Assignment of Deed of Trust to Green Tree, and for Green Tree to appoint NWTS as the successor trustee. Amended Complaint, ¶¶ 38, 40.

The Washington Deed of Trust Act, RCW 61.24.127 ("DTA"), only authorizes post-foreclosure claims for common law fraud, misrepresentation, or violations of the CPA. Accordingly, Plaintiff's claims fail because a foreclosure sale never occurred. *See, e.g., Frias v. Asset Foreclosures Servs., Inc.*, 957 F.Supp.2d 1264, 1271 (W.D. Wash. 2013) ("Courts in this District have consistently found there can be no claim under the DTA for the wrongful initiation of a trustee's sale where no trustee's sale actually occurs.").

Accordingly, this claim must be dismissed due to the lack of any ability for Plaintiff to allege a post-foreclosure claim.

G. PLAINTIFF FAILS TO STATE A CLAIM UNDER RCW § 19.86.020

Plaintiff improperly claims that Defendants violated the Consumer Protection Act ("CPA") based on unfounded and unsupported allegations that Defendants committed a "per se violation" of the statute. Amended Complaint, ¶ 177. Plaintiff relies upon one statement to support this contention by stating "[i]t is impossible to frame definitions which embrace all unfair practices…" Amended Complaint, ¶ 176. What Plaintiff fails to do is demonstrate an *actual* violation of the CPA by Defendants.

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In support of the alleged violation Plaintiffs offer only the following rationale: 1) MERS was a named beneficiary on the Deed of Trust which rendered the document unenforceable in its entirety (Amended Complaint, ¶¶ 38, 44), 2) the Note does not bear dated endorsements (Amended Complaint, ¶¶ 24, 32), and 3) violation of the CPA occurred as a result.

As argued above, Plaintiff's Consumer Protection Act claim is barred by the four-year limitations period. RCW 19.86.120 ("Any action to enforce a claim for damages under RCW 19.86.090 shall be forever barred unless commenced within four years after the cause of action accrues."), which has been followed by *Powell v. Sphere Drake Ins. P.L.C.,* 108 Wash.App 1007, 2001 WL 1011948 at *4 (2001). The statutory period begins to run at the time the contract, here the Deed of Trust, is executed. *See Zhong v. Quality Loan Svc. Corp. of Washington*, 2013 WL 5530583, *4 (W.D.Wash. 2013), *Howard v. Countrywide Home Loans, Inc.,* C13–0133JL R, 2013 WL 1285859 (W.D.Wash. Mar.26, 2013), and *Green v. A.P.C .,* 136 Wash.2d 87, 960 P.2d 912, 915 (Wash.1998).

Next, the "purpose of the Consumer Protection Act [is] to protect the public from acts or practices which are injurious to consumers and not to provide an additional remedy for private wrongs which do not affect the public generally." *Lightfoot v. Macdonald*, 86 Wn.2d 331, 333 (1976). "Acts performed in good faith under an arguable interpretation of existing law do not constitute unfair conduct violative of the consumer protection law." *Perry v. Island Sav. & Loan Ass'n*, 101 Wn.2d 795, 810, 684 P.2d 1281 (1984).

As a matter of law, Plaintiff's CPA claim fails for the reasons stated below.

1. A CPA CLAIM MUST PROVE FIVE ELEMENTS IN ORDER TO BE SUCCESSFUL

"To successfully bring an action under the CPA, a plaintiff must prove five elements: '(1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; [and] (5) causation.'" *Johnson v.*

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Camp Auto., Inc., 148 Wn. App. 181, 185 (2009) (citing *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780 (1986)).

"A CPA claim must show there is a causal link between the alleged misrepresentation or deceptive practice and the purported injury. *Hangman* at 793. '[T]he term proximate cause" means a cause which in direct sequence unbroken by any superseding cause, produces the injury [or] event complained of and without which such injury [or] event would not have happened.' *Schnall v. AT & T Wireless Servs., Inc.*, 171 Wn.2d 260, 278 (2011) (quoting 6 Washington Practice: Washington Pattern Jury Instructions; Civil 15.01 at 181 (5th ed.2005)

If Plaintiff fails to prove every element required under a CPA claim the entire claim fails; "[t]he failure to establish any of the elements is fatal to a CPA claim." *Schnall* at 278 (citing *Holiday Resort Cmty. Ass'n v. Echo Lake Assocs., LLC*, 134 Wn. App. 210, 226 (2006)).

a) PLAINTIFFS FAILED TO ESTABLISH THE PUBLIC INTEREST REQUIREMENT OF THE CPA CLAIM

Plaintiff cannot establish the "public interest" requirement of a CPA claim because the alleged conduct with respect to the Assignments involves private transactions between the Defendants in the normal course of business.

> "Ordinarily, a breach of a private contract affecting no one but the parties to the contract is not an act or practice affecting the public interest." When additional plaintiffs have been or will likely be injured in the same fashion, however, the private dispute might transform into one that affects the public interest. In assessing whether such situation is present, the Court must consider the following factors: (i) whether the alleged unfair or deceptive acts were committed in the course of the defendant's business; (ii) whether the defendant advertised to the public in general; (iii) whether the defendant actively solicited the plaintiff, indicating potential solicitation of others; and (iv) whether the plaintiff and the defendant occupy unequal bargaining positions.

Venetian Stone Works, LLC v. Marmo Meccanica, S.p.A., 2010 WL 5138161 at *1 (internal citations omitted) (citing elements of "public interest" in *Hangman* at 794).

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Because Defendants execute assignments of mortgage for other loans in the ordinary course of business, examination of the four prongs promulgated by *Venetian* is necessary to establish whether public interest was affected.

First, Defendants do not "sell" or otherwise advertise services for the preparation of assignments, and never "solicited" the Borrowers for provision of this service to them. Therefore, Defendants' actions do not fall within the first two prongs of *Venetian.*

Second, the transactions at issue did not include Plaintiff, therefore Defendants could not violate prongs 3 and 4. In order to challenge the Assignment Plaintiff must establish a legally protected interest in the assignment of the Deed of Trust, which Plaintiff cannot do since it is not a party to the assignment, is not granted any rights thereunder, and is not a beneficiary. *See Lonsdale v. Chesterfield*, 19 Wn.App. 27, 31 (1978) (to challenge validity of a contract, plaintiff must be a party to it or third party beneficiary).

Third, in its capacity as an agent for the noteholder, MERS' assignment of a deed of trust is a "ministerial act" that did not occur in "trade or commerce" in Washington. *Bain v Metropolitan Mortg. Group, Inc.*, 2010 WL 891585, *4 n.5 (W.D. Wash. 2010).

b) PLAINTIFF FAILED TO ESTABLISH CAUSATION OF DAMAGES

Plaintiff is required to show a causal link between the alleged violation of the CPA and the injury suffered. *See Schmidt v. Cornerstone Invs., Inc.,* 115 Wash.2d 148, 167, 795 P.2d 1143 (1990). In order to show the causal link, Plaintiff is required to show that but-for MERS' actions, Plaintiffs would not have suffered any injury. *Indoor Billboard v. Integra Telecom*, 162 Wash.2d 59, 84 (2007). Without a demonstration of direct harm a CPA claim fails. *Frias v. Asset Foreclosure Svcs., Inc.*, 957 F.Supp2d 1264, 1270 (W.D.Wash. 2013), See also *Guijosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 917 (2001).

Plaintiffs cannot show that MERS specifically caused any injury.

> I can't find any but-for causal relationship between what MERS did and didn't do and the harm that wasn't suffered. Because even if the filing of foreclosure

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> actions is an injury, and I don't think the showing has been made that there was any injury here, I'll point out that it's also clear that MERS didn't initiate those foreclosure proceedings, lend money, make representations to plaintiff, send plaintiff any default notice or initiate the foreclosure. MERS may have greased the wheels for other people, but I don't think that is enough for causation to injury … if you can't make the showing under prong four injury, its impossible to make the showing under prong five causation.

Bain v. Metropolitan Mortg. Corp., 2013 WL 6193887, *6 (Wash. Super. Ct. 2013). See also *Hangman* at 780 (Plaintiffs must demonstrate that MERS took some unfair or deceptive act in trade or commerce that caused an identifiable injury).

There is also no causal link between Plaintiffs claims of financial injury and the actions of either Green Tree or MERS. If anything, Green Tree has been damaged by the acts of Plaintiff because the Borrowers have been living in the Subject Property without payment on the Note, property taxes, or insurance since at least November, 2011: "I have to say, at least for the past five years plaintiff has been in good shape because she's been living in the home without interference, without any mortgage payments, and indeed any costs but legal fees." *Bain v. Metropolitan Mortg. Corp.*, 2013 WL 6193887, *6 (Wash. Super. Ct. 2013).

Plaintiff's injuries arise from an abject failure to tender monthly installment payments and nothing more. This is not injury that can be attributed to Defendants. See *Massey v. BAC Home Loans Servicing LP*, 2013 WL 6825309 at *8 (W.D. Wash. 2013) (any injuries associated with foreclosure proceedings "were caused solely by her own default.").

Moreover, Plaintiff does not allege confusion over the party to whom loan payments were to be paid such that default would occur, and in fact Exhibits C, E, G, I, K, L, and M to Plaintiff's Complaint and Amended Complaint demonstrate Plaintiff was consistently instructed as to both ownership of the Loan *and* where monthly payments were to be sent.

The Court's record does not reflect evidence of Plaintiffs tendering payments to Defendants or to any other entity, does not contain a declaration that every monthly payment

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required under the Note and Deed of Trust were tendered, and Plaintiffs did not include evidence that Defendants cashed Plaintiff's checks and failed to credit the Loan account.

Plaintiffs willfully failed to tender payments on the Loan for several years, and foreclosure of the Subject Property would be the expected outcome of this failure to pay.

c) THE ASSIGNMENT BY MERS IS NOT NECESSARY AND DOES NOT CONSTITUTE CAUSATION OR INJURY TO PLAINTIFF UNDER THE CPA

Plaintiff incorrectly claims that MERS' identification in the Deed of Trust alone is sufficient to prove violation of the CPA, and that MERS' execution of the Assignment at the direction of, and on behalf of, the note holder creates an actionable CPA injury.

Here, Plaintiff's Deed of Trust contained the following provision: "Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and cancelling this Security Instrument." See RJN Ex. 2, Page 3 of 16, Paragraph 1 of "TRANSFER OF RIGHTS I THE PROPERTY". This means that MERS had authority under the Deed of Trust to execute the Assignment with Plaintiff's express agreement.

Second, the assignment is only a formality and the recording of an Assignment is not necessary or sufficient to confer standing to foreclose; the security follows the Note, not the other way around. *Fidelity & Dep. Co. v. Ticor Title Ins.*, 88 Wn.App. 64, 68, 943 P.2d 710 (1997); see also *Carpenter v. Longan*, 83 U.S. 271, 275 (1872). "Contrary to Plaintiff's assertions, the fact that MERS is listed as a beneficiary of the deed of trust is not relevant to the outcome of this case...by virtue of being in possession of the note, U.S. Bank is the lawful owner. Its right to receive payment on the note does not depend upon any assignment of the

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note from MERS." *Upkoma v. U.S. Bank Nat. Ass'n*, 2013 WL 1934172 at *3 (E.D. Wash, May 9, 2013).

Third, transfer of the Note also transferred the security interest. "From these basic principles, it follows that a transfer of the obligation [here, the Note], by assignment, negotiation, transfer, or whatever form of transfer is sufficient to transfer it, should carry the mortgage along with it. This is indeed the universal result in American law." Stoebuck & Weaver, § 18.20 at 340. See also, *Fidelity & Deposit v. Ticor*, 88 Wn.App. 64, 68-69 (1997), *Price v. N. Bond & Mortg. Co.*, 161 Wash. 690, 695 (1931), *Nance v. Woods*, 79 Wash. 188, 191 (1914), *Spencer v. Alki Point Transp. Co.*, 53 Wash. 77, 90 (1909) ("assignment of the notes ipso facto passes the security"), *Bartlett Estate Co. v. Fairhaven Land Co.*, 49 Wash. 58, 63 (1908) (mortgage "passes to the assignee by an assignment of the debt").

The Deed of Trust automatically follows the Note, and an assignment is unnecessary. Defendant Green Tree was in possession of the "bearer" Note when its Notice of Default was issued on May 10, 2012, and when the Notice of Trustee's Sale was recorded on April 30, 2014. *See* Declaration of Green Tree Loan Servicing LLC in Support of Motion to Dismiss ("Declaration of Green Tree"), ¶¶ 6-7. Any agent Green Tree then elected to act on its behalf had the right to execute the Appointment of Successor Trustee and foreclosure documents.

d) MERS CAN ACT AS AN AGENT FOR THE HOLDER OF THE NOTE

MERS can act as an agent for the holder of a note. *Bain*, 175 Wn.2d 83 at 106, *Zhong* at *3. An agent is able to execute an assignment when that act is within its scope of duties.

A "nominee is one who holds bare legal title to property for the benefit of another." *Fourth Inv. LP v. United States*, 720 F.3d 1058, 1066 (9th Cir. 2013). Washington courts have approved of the role of a nominee for over a century. See, e.g. *Carr v. Cohn*, 44 Wash. 586, 588 (1906) (nominee can bring quiet title action on deed), *Andrews v. Kelleher*, 124 Wash. 517, 534-36 (1923) (bondholders' agent authorized to prosecute foreclosure), *Fid. Trust Co. v. Wash.*

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& Or. Corp., 217 F. 588, 596 (W.D.Wash. 1914), *Anderson Buick Co. v. Cook*, 7 Wn.2d 632, 641-42 (1941) (mortgage remains valid even where mortgagee "held bare legal title" for real property in interest).

As long as the sale of a note involves a member of MERS, MERS remains the beneficiary of record on the deed of trust and continues to act as nominee for the new beneficial owner, regardless of whether the prior owner was no longer in business. *Kiah v. Aurora Loan Serv., LLC*, 2011 WL 841282, *4 (D. Mass. 2011) ("dissolution of [lender] would not and could not prevent [noteholder] from obtaining an assignment of the mortgage from MERS, both as a matter of law and according to the arrangement that existed between MERS and [noteholder] as a 'successor and assign'"). *See also* Restatement (Third) Property § 5.4 cmt. E ("Courts should be vigorous in seeking to find such [agency] relationship").

MERS was the nominee for Pierce Commercial Bank and its successors and/or assigns in interest, and had a limited agency relationship. Plaintiff's Deed of Trust contained a provision allowing MERS to act on behalf of Pierce Commercial Bank. See RJN Ex. 2, Page 3 of 16, Paragraph 1 of "TRANSFER OF RIGHTS I THE PROPERTY". Here the execution of the Assignment was within the scope of duties of MERS pursuant to the Deed of Trust executed by the Borrowers, and Plaintiff's claim fails as a result.

e) GREEN TREE CAN BE THE HOLDER OF THE NOTE EVEN IF FANNIE MAE IS THE OWNER

Plaintiff claims that ownership of the Note by Federal National Mortgage Association ("Fannie Mae") vitiates any acts that were taken by Green Tree. This assertion is incorrect: "Flagstar [the lender] derived its appointment authority as the *holder* of the endorsed Note, a position that is not undermined by the fact that Fannie Mae also had an ownership interest in the Note at the time the appointment was made … 'even if Fannie Mae has an interest in Plaintiffs' loan, Flagstar has the authority to enforce' the indorsed Note that it held in its possession" *Cameron v. Acceptance Capital Mortg. Corp.*, 2013 wl 5664706 (W.D. Wash. 2013).

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f) NO CASE LAW OR STATUTE EXISTS STATING IF THE ORIGINAL TRUSTEE IS STILL IN BUSINESS A SUCCESSOR TRUSTEE CANNOT BE NAMED

Plaintiff's claim that Chicago Title Company is still in business but "has not refused to act as trustee" (Amended Complaint, ¶ 81) fails. There is no case law to support this contention, evidenced by the fact that Plaintiff cites none in the Complaints.

The Court in *Ortega v. Northwest Trustee* supports the ability of the servicer to change the Trustee as a business decision: "We hold that Wells Fargo is a lawful beneficiary of the deed of trust, because it held the Ortegas' original note at the time of foreclosure. Wells Fargo therefore had authority to appoint NWTS as a successor trustee, who then had authority to conduct the trustee's sale." *Ortega v. Nw. Tr. Servs., Inc.*, 179 Wash.App. 1033 at *7 (2014).

As such, Plaintiff fails to prove the allegation that Chicago Title Company can be the only trustee to conduct foreclosure upon the Property for the same reasons that Plaintiff fails to show that Pierce Commercial Bank is the only party that can enforce the Note.

2. PLAINTIFF FAILED TO ESTABLISH A PER SE CPA CLAIM

In the alternative of pursuing a CPA claim, a Plaintiff may instead show that "the alleged act constitutes a per se unfair trade practice." *Saunders v. Lloyd's of London*, 113 Wn.2d 330, 334, 779 P.2d 249 (1989). To establish a "per se" violation of the CPA, Plaintiffs must prove: "(1) the existence of a pertinent statute; (2) its violation; (3) that such violation was the proximate cause of damages sustained; and (4) that they were within the class of people the statute sought to protect." *Dempsey v. Joe Pignataro Chevrolet, Inc.*, 22 Wn.App. 384, 393, 589 P.2d 1265 (1979). Plaintiff fails to establish a per se CPA claim for these reasons:

a) PLAINTIFFS DID NOT ALLEGE VIOLATION OF A STATUTE IN THE CPA CLAIM AND FAIL TO ESTABLISH A PER SE VIOLATION OF THE CPA IN ENTIRETY

Plaintiff never alleged the existence of, or an actual violation of any statute that constitutes a per se violation of the CPA, and Defendants contend that the CPA is not designed

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to protect borrowers who fail to perform under the terms of the Note and Deed of Trust from any and all foreclosure.

It is further established that the mere naming of MERS on a Deed of Trust does not constitute a "per se" violation of the CPA:

> Here, Plaintiff assumes that if Defendant MERS was involved in his mortgage, then the CPA's unfair or deceptive act element is met. (Dkt. No. 24 at 15.) Plaintiff's position lacks merit because it is a misapplication of the Washington State Supreme Court's decision in *Bain v. Metropolitan Mortg. Group, Inc.*, 175 Wn.2d 83, 117 (2012). The Court in *Bain* only held that characterizing MERS as the beneficiary on a deed of trust has the capacity to deceive homeowners, but held that MERS involvement does not by itself constitute a per se violation of the CPA. *Bain*, 175 Wn.2d at 117. Unlike the "concealment" by MERS at issue in *Bain*, here, Plaintiff does not allege any specific unfair or deceptive act by MERS. *Id.* at 116 (finding that MERS may act deceptively when it conceals the identity of its principal and purports to act on behalf of itself). Instead, Plaintiff routinely received written notification regarding which entity was servicing his loan and had no communication with MERS. Plaintiff fails to make the specific allegation that he was deceived by the characterization of MERS as a beneficiary on the Deed of Trust. *Bain*, 175 Wn.2d at 120 ("the mere fact MERS is listed on the deed of trust as a beneficiary is not itself an actionable injury"). Because Plaintiff has failed to allege any cognizable deceptive or unfair trade or practice arising out of MERS's involvement, the CPA claim is DISMISSED.

Zalac v. CTX Mortg. Corp., 2013 WL 1990728 at*3 (W.D. Wash. 2013).

b) PLAINTIFF'S FAILURE TO PAY THE MORTGAGE IS THE PROXIMATE CAUSE OF DAMAGES, WHICH DOES NOT PROVE CAUSATION UNDER THE CPA

Plaintiff ceased tendering monthly payments under the terms of the Note and Deed of Trust since at least November 1, 2011. This act alone is the proximate cause of Plaintiff's damages: "The second prong of the present test is not met as Ms. Helmer was directly liable on the mortgage and her nonpayment of the mortgage led to the foreclosure action." *Western Community Bank v. Helmer*, 48 Wash.App. 694, 700-701 (1987), *followed by Commonwealth Land Title Ins. Co. v. Hart*, 2004 WL 1559773 at *4 (Wash.App., 2004 *unpublished*). See also *Massey* at *8 (any injuries associated with foreclosure proceedings "were caused solely by her own default.").

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The injury Plaintiff asserts is that he is in danger of losing his home to foreclosure. However, the foreclosure would be the expected result because Plaintiff defaulted on his loan obligation. Plaintiff cannot show any other proximate cause between his claimed injury and damages, and accordingly any potential "per se" CPA claim fails.

H. GREEN TREE WAS NOT REQUIRED TO PROVIDE THE ORIGINAL NOTE TO PLAINTIFF PRIOR TO INITIATION OF FORECLOSURE

Plaintiff's Amended Complaint alleges violation of the Consumer Protection Act because Plaintiff was not provided the original endorsed Note prior to initiation of foreclosure proceedings. Amended Complaint, ¶ 27. There is no requirement to "show" the Note to Plaintiff in order to foreclose: "Plaintiffs' 'show me the note' tactic of forestalling foreclosure has been thoroughly discredited by federal courts in this district. *Petree v. Chase Bank*, No. 12-cv-5548-RBL, 2012 WL 6061219, at *2 (W.D. Wash. Dec. 6, 2012) (collecting cases)." *Blake v. U.S. National Bank Assn.*, No. 2:12-cv-02186-MJP, 2013 WL 6199213 at *2 (W.D.Wash. Nov. 27, 2013), *see also Coble v. SunTrust Mortg. Inc.*, 2014 WL 631206 (W.D. Wash. Feb. 28, 2014.

As demonstrated below, the subject Note was indorsed in blank, Defendant Green Tree was in possession of the "bearer" Note when its Notice of Default was issued on May 10, 2012, and when the Notice of Trustee's Sale was recorded on April 30, 2014. Declaration of Green Tree, ¶¶ 6-7. Being in possession of the properly indorsed Note means Green Tree was entitled to enforce the Note. Plaintiff's claims fail as a result.

1. THE HOLDER OF A BEARER NOTE IS ABLE TO ENFORCE THE NOTE AND DEED OF TRUST, AND GREEN TREE WAS IN POSSESSION OF THE NOTE AT ALL RELEVANT TIMES

Regarding Plaintiff's challenge of Defendants' beneficiary status, case law has established that the fundamental issue is whether the party is the holder of the Note, and also that the power to initiate foreclosure lies with the holder of the promissory note regardless of any assignment of the deed of trust. See *Bain*, 175 Wn.2d 83 at 89 ("The plaintiffs argue that

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our interpretation of the deed of trust act should be guided by these UCC definitions and thus a beneficiary must either actually possess the promissory note or be the payee…We agree."). See also *Trujillo v. Northwest Trustee Services, Inc.*, 326 P.3d 768, 774 (2014). Washington has adopted the Uniform Commercial Code, although the "style of the numbers assigned in the Commercial Code differs from the standard RCW numbering system. The purpose of this variance is to enable ready comparison with the laws and annotations of other states which have adopted the Uniform Commercial Code and to conform to the recommendations of the National Conference of Commissioners on Uniform State Laws." *See* Notes, RCW 62A.

When a negotiable instrument is indorsed in blank, it "becomes payable to bearer and may be negotiated by transfer of possession alone …." RCW 62A.3-205(b). RCW § 62A.1-201(20) defines a holder as being "the person in possession if the instrument is payable to bearer or, in the case of an instrument payable to an identified person, if the identified person is in possession." See also RCW 62A.1-201(5).

Pursuant to RCW 62A.3-301 the "Person entitled to enforce" an instrument means (i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to RCW 62A.3-309 or 62A.3-418(d). A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument." RCW § 62A.1-201(20) defines a holder as being "the person in possession if the instrument is payable to bearer or, in the case of an instrument payable to an identified person, if the identified person is in possession."

The Note was endorsed in blank, making it a "bearer" instrument. The Declaration of Green Tree, attached hereto, declares that Defendant Green Tree was in possession of the Note, was entitled to enforce the Note, and did not transfer or assign the Note to any other party or

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entity at any time during the period stated in Plaintiff's Complaints. As a result, Plaintiff's claims as to the Note fail.

2. THE ENDORSEMENT BY SONJA L. LIGHTFOOT IS VALID AND ENFORCEABLE

Plaintiff's challenge to the endorsement of Sonja L. Lightfoot (Amended Complaint, ¶¶ 25-26) lacks merit. If anything, Plaintiff assisted Lightfoot in the furtherance of her acts in order to obtain a loan for which Plaintiff would not otherwise qualify.[3]

First, it is Defendants' knowledge and belief that Lightfoot endorsed the Note in or about May, 2007. Thusly, endorsement of the Note by Lightfoot occurred prior to imposition of the TRO in Ex. N of the Amended Complaint, which reflects an August 22, 2011 date. See Declaration of Green Tree, ¶ 8.

Second, the acts taken by Lightfoot that subjected her to criminal prosecution did not involve endorsements to Notes. Defendants respectfully request this Court take judicial notice of Case No. 3:11-cr-05394-BHS as filed in the Western District of Washington ("Criminal Case"). The activities at issue with Lightfoot involved allegations of loan origination, and more specifically, assisting prospective borrowers in falsifying loan applications to the extent loans would be underwritten for otherwise ineligible borrowers, and the subsequent sale of these loans on the secondary market (Criminal Case, Document No. 4 "Indictment", ¶¶ 14-15, 26-27. See also *Plea Agreement* entered as Docket Item No. 117).

3. PLAINTIFF CONFUSES TICOR TITLE AS THE ESCROW AGENT AND CHICAGO TITLE AS THE TRUSTEE

Plaintiff challenges a stamp by Ticor Title on a copy of the Note he purports to have received from Defendants, which certifies the document is a true and correct copy of the Note,

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[3] *See* the Press Release from the U.S. Attorney's Office 1/15/2013: http://www.fbi.gov/seattle/press-releases/2013/mortgage-fraud-co-schemers-sentenced-in-case-that-crippled-pierce-commercial-bank. The article also states that the identified fraudulent loans that were sold to other entities ultimately had to be repurchased by PCB, which did not occur here.

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because Plaintiff claims Chicago Title is the only party that could have been in a position of making a certified copy of the original Note. Plaintiff appears to confuse the roles of Ticor Title, which appears to be the company responsible for the loan's escrow and closing,[4] and Chicago Title as the Trustee originally named on the Deed of Trust.

It would be customary for an escrow company to make a certified copy of the original Note at or about the time of execution, and to affix a stamp to the copy to show it is an exact replica of the original document. Without more information, it appears that is exactly what occurred with Plaintiff's Note here, and Plaintiff's argument that only Chicago Title could have made the certified copy lacks substance.

I. THE RELATIONSHIP OF MERS AND THE NOTE ARE NOT AT ISSUE

Paragraph 14 of Amended Complaint makes an allegation, unsupported by evidence, that MERS "never [has] anything to do with the note" and references Exhibits "Q" and "P". A check of the Court's Docket as of November 20, 2014 reflects that Plaintiff only filed Exhibits A-N. Therefore Defendants cannot properly address Plaintiff's statement because it was improperly pled. However, Defendants contend that Plaintiff's assertion as to MERS is incorrect nonetheless, and as a result the defect could not be cured by further amendment.

Defendants admit that MERS is not a party to the Note and does not take possession of original loan documents. MERS is not a mortgage loan originator, lender or servicer; MERS' role is to act as record beneficiary on deeds of trust as nominee (agent) for the beneficial owner of the mortgage loan secured by the MERS deed of trust. MERS was the nominee for Pierce Commercial Bank and its successors and/or assigns in interest, and had a limited agency

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[4] *See* https://www.washingtontitle.com/, the website for Ticor Title in Washington State. The website states Ticor Title handles escrow of real property loans. The site further states "Escrow is an arrangement in which a disinterested third party (an escrow holder), holds legal documents and disburses funds on behalf of a buyer and seller, and distributes them according to the buyer and seller's instructions." (https://www.washingtontitle.com/pages/what-happens-in-escrow.aspx). It makes sense that Ticor Title would make a copy of the executed Note for its records prior to transfer of the document to the original lender.

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relationship with each note-owner since origination. Plaintiff's own Deed of Trust supports this: "Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and cancelling this Security Instrument." See RJN Ex. 2, Page 3 of 16, Paragraph 1 of "TRANSFER OF RIGHTS I THE PROPERTY". Moreover, MERS is an agent and can act as an agent for the holder of a note. *Bain v. Metro. Mortg. Grp., Inc.,* 175 Wn.2d 83, 106, 285 P.3d 34 (2012), followed by *Zhong v. Quality Loan Svc. Corp. of Washington*, 2013 WL 5530583, *3 (W.D.Wash. 2013).

MERS executed an Assignment to Green Tree Servicing, LLC (RJN Ex. 3), and Green Tree Servicing LLC executed the Appointment of Successor Trustee (RJN Ex. 4). MERS is not a named entity in the Note, never claimed possession or ownership of the Note to Plaintiff or any other party, and did not act beyond its contractual scope of authority. As a result Plaintiff's claim fails and must be dismissed.

J. PLAINTIFF FAILS TO OFFER EVIDENCE OF "COMPUTERIZED" OR "ROBO-SIGNING" ON PART OF DEFENDANTS

The Amended Complaint appears to allege that Defendants were involved in "robo-signing" practices with his allegation of Defendants' use of "computerized signatures." *See* Amended Complaint, ¶¶ 61-62. Plaintiff fails to prove robo-signing occurred on any of the specified documents, or even that Plaintiffs have standing to challenge the documents alleged in the Complaint.

"Plaintiffs argue that they have been injured by the alleged improper signing of reconveyance documents .... Plaintiffs point the Court to no Washington state authority to support those legal conclusions. ...Absent some legal or expert authority supporting their claim, Plaintiffs' assertion that the allegedly robo-signed documents interfere with their chain of title is

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entirely speculative." *Reid v. Countrywide Bank, N.A.*, 2013 WL 7219500 at *3 (W.D. Wash. Nov. 1, 2013). Additionally,

> Plaintiff's second argument relates to so-called "robo-signing" of the documents used to initiate foreclosure proceedings. Even assuming for the sake of argument that the assignments in question were fraudulently executed, Plaintiff, as a third party, lacks standing to challenge them. *See Bateman v. Countrywide Home Loans,* 2012 WL 5593228 at *4 (D.Hawai'i 2012) (unpublished) ("The reason debtors generally lack standing to challenge assignments of their loan documents is that they have no interest i n those assignments, and the arguments they make do not go to whether the assignments are void *ab initio,* but instead to whether the various assignments are voidable. Debtors lack standing to challenge voidable assignments; only the parties to the assignments may seek to avoid such assignments.") (citing *Williston on Contracts* § 74:50 (4th ed.)); *In re MERS Litigation,* 2012 WL 932625 at * 3 (D.Ariz.2012) (unpublished) (holding that allegations of robo-signing failed to state a claim because plaintiff lacked standing to challenge assignment); *Kuc v. Bank of Am., NA,* 2012 WL 1268126 at *2 (D.Ariz.2012) (unpublished) ("[P]laintiff, as a third-party borrower, does not have standing to challenge the validity of any allegedly 'robosigned' recorded assignments."); *Javaheri v. JPMorgan Chase Bank N.A.,* 2012 WL 3426278 at *6 (C.D.Cal.2012) (unpublished) (accepting allegations of robo-signing as true, but holding that plaintiff lacked standing to challenge substitution of trustee agreement). Defendants are entitled to summary judgment on these claims.

Upkoma v. U.S. Bank Nat. Ass'n, 2013 WL 1934172 at *4 (E.D. Wash, May 9, 2013).

As a result, Plaintiff must show more than bare allegations of fraudulent "robo-signing" and that, but for the "robo-signing" Plaintiff was harmed by the act. Plaintiff is not a party to the Assignment or Appointment of Successor Trustee, fails to show causation or injury from robo-signing in light of his failure to tender monthly payments under the Note and Deed of Trust, and lacks standing to challenge the documents, let alone "rely" on them.

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VI. CONCLUSION

WHEREFORE, based upon the facts and conclusions above, Defendants requests that:

1. Defendants' Motion to Dismiss be granted;
2. This action be dismissed in its entirety with prejudice, without an additional leave to amend; and
3. For such other and further relief as the Court deems just and proper.

Dated: December 2, 2014

Respectfully submitted,
WRIGHT, FINLAY, & ZAK, LLP

By: _____
Renee M. Parker, WSBA # 36995
Attorneys for Defendants,
GREEN TREE SERVICING LLC and
MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS, INC.

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DECLARATION OF SERVICE

The undersigned declares as follows:

On December 2, 2014, I served the foregoing document: **NOTICE OF MOTION AND MOTION TO DISMISS BY DEFENDANTS GREEN TREE SERVICING LLC AND MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.** on interested parties in this action by placing a true copy thereof enclosed in a sealed envelope via postage prepaid, regular first class mail and/or electronic service as follows:

SERVICE VIA U.S. MAIL:

CHAMBER COPY:
The Honorable Benjamin H. Settle
United States Courthouse
1717 Pacific Avenue, Room 3100
Tacoma, WA 98402 - 3200

ELECTRONIC SERVICE:

PLAINTIFF:
James A Bigelow
sistermoonproductions@gmail.com

I declare under penalty of perjury under the laws of the State of Washington and the United States of America that the foregoing is true and correct.

DATED this 2nd day of December, 2014

Steven E. Bennett

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